

**UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Case No. 1:17-cv-00276-CCE-JLW**

**THE UNITED STATES OF AMERICA,
ex rel. JOSEPH M. THOMAS,**

Plaintiff,

v.

**DUKE UNIVERSITY, DUKE UNIVERSITY
HEALTH SYSTEM, INC., WILLIAM M.
FOSTER, PH.D., AND
ERIN N. POTTS-KANT**

Defendants.

**DEFENDANTS' MOTION TO COMPEL THE NATIONAL INSTITUTES OF
HEALTH TO PRODUCE DOCUMENTS AND TESTIMONY**

Pursuant to Rule 45(d)(2)(B) of the Federal Rules of Civil Procedure, Defendants Duke University and Duke University Health System (collectively, “Defendants”) respectfully move this Court for an order to compel the National Institutes of Health (“NIH”) to produce documents and corporate testimony in response to subpoenas served pursuant to the *Touhy* regulations applicable to the Department of Health and Human Services (“DHHS”).

Defendants have engaged in many communications with counsel for the NIH since January 2018 regarding the deficient production of documents responsive to their subpoena. While the NIH has produced some responsive documents to Defendants’ subpoena, the agency has still not produced: (1) the email communications by and among NIH employees with other government or non-government officials regarding the

specific grants requested in the Subpoena; (2) the agency's document retention policies; (3) all of the documents related to the Scientific Review Group ("SRG") or the Advisory Council/Board's review of the specific grants requested in the Subpoena, including but not limited to the process used to review the specific grants requested in the Subpoena or the documents used by NIH staff and study section group members to review the specific grants requested in the Subpoena; and (4) documents that identify individuals or entities that have been subject to any administrative or enforcement action for failing to adhere to an Assurance of Compliance.¹ A copy of Defendants' subpoena requesting the production of documents accompanies Defendants' Memorandum in Support of this Motion to Compel at **Exhibit A**.

Defendants also served a subpoena requesting testimony from an NIH corporate representative pursuant to Federal Rule of Civil Procedure 30(b)(6). NIH has not yet provided any formal response to Defendants' request to take the deposition of a 30(b)(6) representative. A copy of Defendants' subpoena requesting 30(b)(6) deposition testimony accompanies Defendants' Memorandum in Support of this Motion to Compel at **Exhibit B**.

After months of delay, NIH has not provided a complete response to Defendants' properly served subpoenas, nor has NIH provided any estimate for when Defendants can expect a response or any explanation for the substantial delay. As a result, Defendants submit this Motion to Compel and respectfully request that the Court enter an order to

¹ NIH has not served Defendants with a privilege log detailing whether any of these documents are being withheld and on what grounds.

compel the NIH to produce the documents and testimony requested by Defendants' subpoenas.

Defendants have met and conferred in good faith with NIH counsel regarding the deficiencies in the production of documents and 30(b)(6) corporate testimony; ultimately, counsel were not able to resolve this dispute.

Defendants are contemporaneously filing a memorandum in support of this motion.

Dated: June 27, 2018

Respectfully submitted,

/s/ James P. Cooney III

James P. Cooney III
North Carolina Bar. No. 12140
Womble Bond Dickinson (US) LLP
301 S. College Street, Suite 3500
Charlotte, NC 28202
Telephone: (704) 331-4980
Fax: (704) 338-7838
Jim.Cooney@wbd-us.com

Frederick Robinson
Admitted Pro Hac Vice
Reed Smith LLP
1301 K Street, N.W., Suite 1000 – East Tower
Washington, D.C., 20005-3373
Telephone: (202) 414-9200
Fax: (202) 414-9299
FRobinson@reedsmith.com

Carol Poindexter
Admitted Pro Hac Vice
Norton Rose Fulbright US LLP
799 9th Street NW, Suite 1000
Washington, D.C., 20001-4501
Telephone: (202) 662-0200
Fax: (202) 662-4643
Carol.Poindexter@nortonrosefulbright.com

Megan Fanale Engel
Admitted Pro Hac Vice
Reed Smith LLP
1301 K Street, N.W., Suite 1000 – East Tower
Washington, D.C., 20005-3373
Telephone: (202) 414-9200
Fax: (202) 414-9299
MEngel@reedsmith.com

*Counsel for Defendants Duke University
and Duke University Health System, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2018, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will send a Notice of Electronic Filing to counsel of record in this matter.

/s/ James P. Cooney III
James P. Cooney III